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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 965

M. A. HOLAHAN, TRUSTEE,
Petitioner,

versus

FORD, BACON & DAVIS, INCORPORATED,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
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M. A. HOLAHAN, TRUSTEE,
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FORD, BACON & DAVIS, INCORPORATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Plaintiff-appellee petitions for a writ of certiorari to review the judgment of the United States Court of Appeals from the Fifth Circuit entered in this case on December 27, 1962.

OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana, New Orleans Division, gave its reasons for judgment in opinion form (App. A, infra.) and further reasons for denying the motion for a new trial (App. B, infra.). The opinion of the Court of Appeals is reported at 301 F. 2d, pp. 901 through 904, and the opinion is appended hereto as App. C. The Court of Appeals in denying the petition for rehearing did so without opinion.

JURISDICTION

The decree of the Court of Appeals was rendered and entered on December 27, 1962, and the order denying the petition for rehearing was entered without opinion on February 28, 1963, by order of the Court of Appeals dated March 6, 1963, by Judge Hutcheson stayed the mandate of the Court for thirty days to allow your petitioner to petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where an involuntary petition in bankruptcy was filed against a corporation on August 16, 1957, and the corporation adjudicated on July 10, 1958, an involuntary bankrupt, is the date of the filing of the petition against the corporation the date to determine whether a contract between the bankrupt and another is executory, or is the date of adjudication the determinative date?

2. If a contract between a bankrupt and another provides that "reports, plans and specifications shall be the property" of the bankrupt and shall not be used by the other party, is this contract a "personal service" contract?

3. Does the interest or property rights of a bankrupt in a contract for personal services, that is executory on date of bankruptcy but executed on date of adjudication, vest in the Trustee?

4. If the interest or property rights of a bankrupt in a contract for personal services, that is executory on date

of bankruptcy, but executed on date of adjudication, does not vest in the Trustee, is the bankrupt estate burdened with the claims of those creditors that were incurred by the bankrupt in connection with the contract prior to the date of bankruptcy?

5. In a case where the parties to the litigation have stipulated all relevant facts, can the United States Court of Appeals assume facts in reaching its decision?

STATUTES INVOLVED

Title 11, United States Code Annotated, Section 110, provides in pertinent part:

> "a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, . . ."
>
> (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: . . ."
>
> "b. Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: . . ."

"d. After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs --

(5) A person asserting the validity of a transfer under this subdivision shall have the burden of proof. Except as otherwise provided in this subdivision and in subdivision g of section 21 of this Act, no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee: . . . "

Title 11, United States Code Annotated, Section 63, provides in pertinent part:

"b. In the interval after the filing of an involuntary petition and before the appointment of a receiver or the adjudication, whichever first occurs, a claim arising in favor of a creditor by reason of property transferred or services rendered by the creditor to the bankrupt for the benefit of the estate shall be provable to the extent of the value of such property or services."

Title 11, United States Code Annotated, Section 1, provides in pertinent part:

"(13) 'Date of bankruptcy', 'time of bankruptcy', 'commencement of proceedings', or 'bankruptcy', with reference to time, shall mean the date when the petition was filed;"

STATEMENT OF THE CASE

Plaintiff-appellee is the Trustee of the bankrupt estate of Gulf Securities of Louisiana, Inc. (hereinafter referred to as "Gulf" or the "bankrupt"). This bankrupt estate is presently under administration of the United States Referee for the Eastern District of Louisiana, and the proceeding bears Docket No. 8951 of the Bankruptcy Docket of that Court.

On August 16, 1957, a petition was filed by some of the creditors of Gulf to have it adjudged an involuntary bankrupt, and on July 10, 1958, Hon. Herbert W. Christenberry, the Senior Judge for the Eastern District of Louisiana, adjudged Gulf a bankrupt.

On July 11, 1958, Gulf, the bankrupt, issued a check to the defendant-appellant, Ford, Bacon & Davis, Inc., in the amount of $10,456.59. This check was drawn on the regular checking account maintained by the bankrupt in the Union Planters Bank, Memphis, Tennessee, and the check was paid by the bank on July 15, 1958, some five days after Gulf had been adjudicated a bankrupt.

Plaintiff-appellee instituted a plenary action against the defendant-appellant, Ford, Bacon & Davis, Inc., to recover the sum of $10,456.59, alleging that it represented a transfer by the bankrupt after bankruptcy and after adjudication; hence, the transfer was void under 11 U.S.C. 110(d)(5).

Defendant-appellant maintained that the $10,456.59 was obtained by the bankrupt from the performance of a per-

sonal service contract the bankrupt had entered into with the Paris-Henry County Utility District of Henry County, Tennessee (hereinafter referred to as "County"). In connection with this position, defendant-appellant maintained that since the personal service contract was executory on August 16, 1957, the date of filing of the involuntary petition against Gulf, the proceeds derived from the performance by the bankrupt of this contract did not vest in the plaintiff-appellee Trustee and that the bankrupt was free to dispose of the proceeds as it saw fit.

The contract in question was labelled Exhibit 1 in the Trial Court and has been appended hereto as App. D. As the exhibits were not printed in the record in the Lower Court, by motion they were filed in the United States Court of Appeals, Fifth Circuit, and petitioner requested that these original exhibits be forwarded to this Court for viewing, along with consideration of this application.

After issue was joined in the matter, the parties executed and filed in the District Court, a stipulation of all of the relevant facts, and each party filed a motion for summary judgment. The District Court had jurisdiction to entertain the plenary action under the provision of 11 U.S.C. 46.

The stipulation of facts discloses that the bankrupt is a Louisiana corporation engaged in the promotion of revenue bond issues of political subdivision, and in connection therewith, did execute contracts with the political subdivision to furnish the necessary services needed in connection with the sale of the proposed revenue bonds. A typical contract is Exhibit 1 (App. D, infra.), and it delineates the

services that were to be furnished by Gulf, the bankrupt, to the County herein.

This contract, from which the bankrupt ultimately derived the sum of $48,825.00 in cash, was executory on the date that the petition was filed against Gulf, namely, August 16, 1957. This contract provided, among other things, that all reports, plans and specifications were to be the property rights of the bankrupt and were not to be used by the County for any purpose whatsoever without the written permission of Gulf, the bankrupt.

The stipulation of facts in the Lower Court (Par. 3) states that the bankrupt did communicate with nationally known firms of bond underwriters to ascertain the requirements of such firms in connection with such firms' purchases of such bonds, and in particular, did inquire as to the requirements as to cost and engineering feasibility studies of the proposed projects. These bond underwriting firms would designate the attorneys and engineering firms which would be satisfactory to them, as the underwriter was always greatly concerned, because the legal and engineering opinions are large factors in the saleability of the bond issues.

The stipulation of facts (Par. 5) states that Ira. B. Haupt & Company, a nationally known bond underwriter, communicated with the defendant and requested a proposal from the defendant in respect to the engineering studies and reports on the feasibility of the County's project.

On October 25, 1957, defendant received a letter from Haupt authorizing it "to immediately proceed in the work

involved". Haupt also informed defendant that its contact was a Mr. A. L. Busby, an officer of the bankrupt (see Par. 7, Stipulation).

On April 18, 1958, the defendant completed its contract with Gulf, the bankrupt, and on June 14, 1958, rendered a billing to Gulf for the services it performed for Gulf. On April 30, 1958, Haupt agreed to purchase the bonds in question from the County and deposited its $32,000.00 certified check with the County.

On July 10, 1958, the bond issue was ready to be sold, and the actual sale of the bonds took place on July 11, 1958, at which time the County delivered to Gulf, the bankrupt, its check for $48,825.00. This check was deposited in the regular checking account of the bankrupt corporation maintained in the Union Planters Bank, Memphis, Tennessee. On July 10, 1958, the County and Gulf entered into a superseding agreement (Exhibit 2, appended hereto as App. E). Exhibit 2 provided that Gulf was to pay the engineering services provided, out of the funds that it received from the sale of the bond issue, including the fees and charges of International Engineers, Inc. (International Associated Engineers), Ford, Bacon & Davis, Inc. and R. W. Stafford Co.

Paragraph 22 of the stipulation shows that International Engineers, Inc. (International Associated Engineers) was not paid by Gulf, the bankrupt, and that it filed a claim against the bankrupt estate in the sum of $39,817.03 for work that it had performed for the bankrupt in connection with the County's project, some of the work being per-

formed prior to the date of filing and some after the date of filing.

The stipulation (Par. 20) states that the account of the bankrupt maintained in the Union Planters National Bank, Memphis, Tennessee, had been in existence since November 16, 1956 and that the balance of the funds contained therein were turned over to plaintiff-appellee on February 3, 1959.

The stipulation (Par. 21) also provides that in the bankruptcy proceeding, Gulf, the bankrupt, filed schedules and listed on Schedule B-3, "Choses in Action", the following: "Paris-Henry County Public Utility District of Henry County Tennessee, not fully earned fee — $5,425.00".

The stipulation does not contain any statement that shows that the defendant-appellant was paid the $10,456.59 out of the $48,825.00 received by the bankrupt from the County on the contract in question.

The District Court, with written reasons, appended hereto as App. A, found that the contract in question was not a personal service contract, denying the motion for summary judgment filed in behalf of the defendant-appellant, and granting the motion for summary judgment of plaintiff-appellee. The District Court, with further reasons, appended hereto as App. B, denied the motion for rehearing filed by the defendant-appellant, and the defendant-appellant, under the provisions of 11 U.S.C. 47 and 48, filed an appeal to the United States Court of Appeals, Fifth Circuit. The United States Court of Appeals, Fifth Circuit, as

previously stated, reversed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Chandler Amendments to the Bankruptcy Act of 1910 were passed by Congress in 1938, and in particular, the Chandler Amendments amended 11 U.S.C. 110(a), and added 11 U.S.C. 110(b), 11 U.S.C. 110(d) and 11 U.S.C. 103 (b).

The action which forms the basis of the application to this Court for certiorari will be the first opportunity presented to this Court to interpret the relationship of these sections to the rights and title of a Trustee in Bankruptcy to the property and interest of the bankrupt. The questions presented involve important questions in federal law in light of the fact that bankruptcies have increased extensively over the last few years.

I.

As previously stated, a petition was filed against Gulf on August 16, 1957, asking the Court to adjudicate it an involuntary bankrupt. Gulf continued the operation of its business for approximately eleven months, that is, until the date of adjudication, July 10, 1958.

On the date of bankruptcy, August 16, 1957, Gulf had in existence a contract with Paris-Henry County Utility District that was partially executed, but under the law, considered executory, and with the bankrupt continuing in business, it continued to work on this contract, as it

contested the fact that it was the proper subject of an adjudication in bankruptcy.

11 U.S.C. 110(a) vests a Trustee in Bankruptcy with the title of the bankrupt "as of the date of the filing of the petition", and 11 U.S.C. 110(b) allows a Trustee in Bankruptcy sixty days after the *adjudication* to accept or reject an executory contract. In light of these provisions of the Bankruptcy Act, the important question should be answered by this Court as to whether one must look to the status of a contract on the date of the filing of the petition in bankruptcy to determine whether it is executory or whether one must look to the date of adjudication to determine whether the contract is executory.

This question is particularly significant in the situation here where an involuntary petition is filed, and Gulf, some eleven months later, was adjudicated a bankrupt. It is particularly significant in the situation that Gulf had a partially executed but executory contract on the date of bankruptcy, but an executed contract on the date of adjudication.

Prior to the Chandler Amendments of 1938, anyone whose claims arose after the date of the filing of bankruptcy did not have a provable claim against the bankrupt estate. The Chandler Amendments added 11 U.S.C. 103(b), affording this person the right to file a claim against the bankrupt estate if the services rendered by the creditor to the bankrupt benefited the bankrupt estate. In this proceeding, the defendant-appellant performed services which benefited the bankrupt estate in that it helped the bankrupt during the interim of the filing of the petition and the ad-

judication, to complete its contract with the County. Therefore, defendant-appellant has a provable claim against this bankrupt estate, as did the creditors who furnished the services to the bankrupt in connection with the contract in question herein (Exhibit 1) prior to the date of the filing of the petition in bankruptcy.

Likewise, Congress, in the Chandler Amendments of 1938, added 11 U.S.C. 110(d) to protect those persons who dealt with the bankrupt after the date of the filing of the petition, but prior to the adjudication.

It was submitted to the Court of Appeals by the plaintiff-appellee that in light of 11 U.S.C 103(b), 110(b) and 110(d), that one must look to the date of adjudication to determine whether a contract is executory or executed. If the Court of Appeals is correct in its holding that the date of filing is the critical date to determine whether a contract is executory or not, it would place a bankrupt estate in the awkward position of legally having to recognize the claims of those creditors that arose prior to the date of filing of the petition in bankruptcy, and at the same time, deny the bankrupt estate the benefits of the contract which was executed on the date of adjudication.

For illustration, International Associated Engineers furnished services to the bankrupt in connection with a contract with the County (Exhibit 1) and has a provable claim against this bankrupt estate under the rationale of the Court of Appeals, since its claim was in existence on August 16, 1957, yet this bankrupt estate is denied the right to the proceeds from that contract, and International Associated Engineers will not participate in those proceeds.

In addition, this will put a bankrupt in a situation of Gulf, with being able to use the property or property rights in existence on August 16, 1957, to its own benefit. Under the rationale of the Court of Appeals' decision, Gulf could have squandered the $48,825.00 that it received from the County when the contract was executed. For explanation as to the purposes of 11 U.S.C. 103(b), 110(b) and 110(d), see *Remington on Bankruptcy*, Vol. III, section 1383, *Collier (14th Ed.)*, Vol. III, section 63.34 at page 1954 and *Collier (14th Ed.), Vol. IV*, section 70.43 at page 1365.

II.

The Court of Appeals found that Exhibit I was a personal service contract, and since it was executory on the date of bankruptcy, August 16, 1957, it did not vest in the Trustee, the plaintiff-appellee. The contract in question (Exhibit 1) contains the following provisions on page 3:

> "Reports, plans and specifications shall remain the property of Gulf Securities, Inc. until completion of said project and shall not be used by the District for any purpose whatsoever without the written permission of Gulf Securities, Inc."

The point was made that the contract in question with the above clause is not a personal service contract and that the property rights in existence on August 16, 1957, belong to the plaintiff-appellee Trustee herein.

By way of illustration, if we assume that the bankrupt, Gulf, had, on August 16, 1957, filed a voluntary petition in bankruptcy, would not the reports, plans and speci-

fications form a property right vesting in the Trustee, plaintiff-appellee, under 11 U.S.C. 110(a) (5).

It is submitted that the contract in question (Exhibit 1) is not a personal service contract as so held by the United States Court of Appeals.

III.

Let us assume that the contract in question, Exhibit 1, is a personal service contract as so held by the Court of Appeals. If this be the case, then this Court should and must answer the important question as to whether the property rights of the bankrupt in connection with this personal service contract vest in the Trustee. Likewise, the question must be answered as to whether a bankrupt, against whom an involuntary petition had been filed some eleven months prior to the adjudication, can use the property rights in existence under the personal service contract to his own benefit and derive therefrom free and clear, the proceeds to squander as it sees fit. In effect, the result of the decision of the United States Court of Appeals in this matter allows a bankrupt to accomplish this very thing, for it held that since the contract was a personal service contract and executory on date of filing, that the interest did not vest in plaintiff-appellee, the Trustee. This allowed Gulf, the bankrupt, to use the interest or property rights in existence on August 16, 1957, to complete this contract, receive the $48,825.00, and do what it wanted to do with the money. In fact, this bankrupt, acting through its President, Herman C. Haack, and its Vice-President, Arthur L. Busby, paid $10,456.00 to the defendant-appellant, and the defendant-appellant returned to Arthur L. Busby some $5,-

000.00 he had previously advanced (see Par. 14 of Stipulation).

IV.

If we assume that the contract in question is a personal service contract and that the interest or property rights in existence on date of bankruptcy do not vest in the plaintiff-appellee Trustee, then the important question is raised as to whether this bankrupt estate must recognize as provable claims those claims of creditors that furnished services to the bankrupt in connection with Exhibit 1 prior to August 16, 1957, the date of bankruptcy.

The Court of Appeals stated that since the rights of these creditors were not the issue in this case, that they were making no holding as to their rights. It is submitted that this question should have been answered by the Court of Appeals and should be answered by this Court, as your plaintiff-appellee, the Trustee of this bankrupt estate, as a result of the decision of the United States Court of Appeals, is placed in the awkward position of having to deny these claims, yet he has no legal basis for denying the claim of a creditor of a bankrupt which was legally in existence on the date of bankruptcy.

It must be pointed out to this Court that the District Court recognized the fact that other engineers who performed services in connection with the proposed bond issue remained, and do remain, unpaid for the services that they rendered.

V.

The plaintiff-appellee has already pointed out in the Statement of the Case that all relevant facts in connection with litigation were stipulated to by the parties. In spite of this, the Court of Appeals in its decision assumed the fact that the defendant was paid out of the $48,825.00 received by the bankrupt from the contract with the County. This fact was not stipulated to by the parties and does not form part of the record. The appellant, under 11 U.S.C. 110(d) (5) bears the burden of proving this fact. See also for reference, *Lake v. New York Life Insurance Co.* (CCA 4th 1955, 218 F. 2d 394, 397, cert. den. 349 U. S. 917, 75 Supreme Court 606), and *Feldman v. Capitol Piece Dye Works, Inc.*, 293 F. 2d 889, 892.

The Court of Appeals also concluded that the County "necessarily relied upon Gulf's reputation". This conclusion was reached without the Court of Appeals knowing what Gulf's reputation was, and certainly the stipulation entered into by the parties does not include such a statement. In fact, Paragraph 3 of the stipulation shows that the bond underwriting firm, such as Haupt, the ultimate purchaser of the bond issue herein, did designate the legal and engineering firms. This certainly varied as to bond underwriting companies, hence was a wrong conclusion on the part of the Court of Appeals.

It is submitted that in the situation presented to the Court of Appeals, it cannot assume or conclude any facts which are not contained in the stipulation entered into by and between the parties.

CONCLUSION

Your petitioner, the plaintiff-appellee, the Trustee of the bankrupt estate of Gulf Securities of Louisiana, Inc., in addition to this proceeding, presently has pending like actions in the United States District Court for the District of Columbia and the United States District Court for the Southern District of New York. The questions presented all involve important questions of federal law, and it is respectfully submitted that the Court grant unto your petitioner a writ of certiorari.

PAUL J. THRIFFILEY, JR.
and
JOHN W. BRYAN
Attorneys for Petitioner
717 Richards Building
New Orleans 12, Louisiana

By_____
JOHN W. BRYAN

CERTIFICATE

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared PAUL J. THRIFFILEY, JR., who, after being duly sworn, did depose and say:

That he is one of the attorneys for the petitioner in the foregoing Application and that he has caused to be served a copy of the foregoing Application and accompanying Appendices on Gibbons Burke, Esquire, Attorney for appellant, by placing a copy of same addressed to his office, in the United States Mails, postage prepaid.

PAUL J. THRIFFILEY, JR.

Sworn to and subscribed before
me this — day of March, 1963

Notary Public

APPENDIX "A"

Minute Entry
June 22, 1962
Ainsworth, J.

M. A. HOLAHAN, TRUSTEE
versus
FORD, BACON & DAVIS, INC.

NO. 9189
CIVIL ACTION
DIVISION "D"

This cause came on for hearing on a former day on motion of plaintiff M. A. Holahan, Trustee, and motion of defendant Ford, Bacon & Davis, Inc. for summary judgment. The pertinent facts are in the record by written stipulation. The court, having heard the arguments of counsel and studied the briefs, is now ready to rule.

IT IS ORDERED that the motion of plaintiff M. A. Holahan, Trustee, for summary judgment be, and the same is hereby, GRANTED; the motion of defendant Ford, Bacon & Davis, Inc. for summary judgment is DENIED. The right is reserved to defendant to file a claim against the bankrupt estate and participate rateably as a creditor, in accordance with law.

REASONS

1. August 16, 1957, involuntary petition in bankruptcy was filed against Gulf.

2. October 25, 1957, defendant Ford, Bacon & Davis, Inc. was authorized to proceed to make engineering studies and reports as to the feasibility of a proposed bond

issue for Utility District; and the work was completed in June 1958.

3. April 10, 1958, defendant received $5,000.00 as an advance payment on account of its services, by check drawn by A. L. Busby, who was an officer of bankrupt corporation.

4. July 10, 1958 Gulf was adjudicated a bankrupt.

5. July 11, 1958, Gulf received $48,825.00 from Utility District for services in connection with the bond issue.

6. July 14, 1958, Gulf paid defendant $10,456.59, and A. L. Busby requested return of the advance payment of $5,000.00; defendant accordingly issued its check to A. L. Busby for $5,000.00 and collected its payment of $10,456.59 on July 15, 1958.

It will be observed therefore that it was *after* the adjudication of bankruptcy that Gulf received the funds from the Utility District and paid defendant Ford, Bacon & Davis for its services; defendant likewise returned the advance payment made to it individually by A. L. Busby, an officer of bankrupt corporation.

The agreement between Gulf and Utility District (Exhibit #1) provided that Gulf was:

> "To provide this complete service and to provide *at their own expense* the following services, to-wit: (Emphasis added.)

"(a) Fully qualified engineers to perform all engineering phases of the projects and submit legally certified reports of same." (Section 12)

See also Exhibit #2, paragraph 2, in which Gulf agreed with Utility District to pay for the engineering services of defendant Ford, Bacon & Davis, Inc.

Thus, the engineering services furnished by the defendant created an obligation of Gulf, not Utility District. Gulf contracted with defendant in its own name and in its own right, not as an agent of Utility District. Therefore, when Utility District paid Gulf the $48,825.00, title vested in Gulf and thereby to the Trustee, pursuant to Section 70 of the Bankruptcy Act (11 U.S.C. § 110).

The funds received by Gulf from Utility District do not come within the exception afforded personal contracts and the balance due Gulf from Utility District is a chose in action which passes to the Trustee. See 4 Collier on Bankruptcy, ¶ 70.22[3], n. 13. Nor has defendant sustained its burden of proof (required by Section 70 (d) (5) of the Bankruptcy Act) that the funds received by Gulf from Utility District were impressed with a trust and the property (funds) should be delivered to the beneficiaries including defendant. There is nothing in the stipulation of facts or attached exhibits upon which such a conclusion can be based.

The contract between Gulf and Utility District was executory at the time of the filing of the petition for bankruptcy,

but it was wholly executed and completed when the court finally adjudicated the bankrupt.

The stipulation of facts does show that defendant acted in good faith, was not aware of the petition for involuntary bankruptcy, and performed and completed its services during the period the petition for bankruptcy was pending.

For defendant to prevail here, however, this transaction must be one of those protected by Section 70(d) of the Bankruptcy Act as amended by the Chandler Act of 1938. As stated in *Lake v. New York Life Insurance Company*, 4 Cir., 1955 218 F. 2d 394, 399, "It is obvious that the intent of this enactment is to invalidate transactions not granted specific protection under the Act and thus put to an end the confusion theretofore existing in the decisions. There is almost always some injustice or hardship which attends transactions occurring after the filing of a petition in bankruptcy between the bankrupt, acting wrongfully, and an innocent third person, because the loss must fall either upon the third person or upon the creditors of the bankrupt. Whether the line which has been drawn is the best possible solution of the problem is not for the courts to say."

The authorities which interpret Section 70(d) are clear in holding that this protection ceases under all circumstances (except transactions provided for by Section 21(g) upon the adjudication of the bankrupt. See 4 Collier on Bankruptcy, ¶ 70.68, pp. 1504, 1505.

This brings about a harsh result in the present case, but the law is so plain we cannot disregard it. Parenthetically, other engineers who performed services in connection with the proposed bond issue were also unpaid though their services were for much greater amounts than defendant's. They too have been relegated to the status of ordinary creditors of the bankruptcy estate. No transaction or transfer, except for the 21(g) provision relating to transfers of real estate, may occur after the adjudication. Here the funds were received by Gulf and payments made to defendant *after* the adjudication. We have been unable to find, despite a diligent search, any provision of law or holding of a court authorizing or validating a transaction or transfer which occurs *after* adjudication.

APPENDIX "B"

Minute Entry
July 30, 1962
Ainsworth, J.

M. A HOLAHAN, TRUSTEE — No. 9189
versus — CIVIL ACTION
FORD, BACON & DAVIS, INC. — DIVISION "D"

This cause came on for hearing on a former day on motion of defendant Ford, Bacon & Davis, Inc. for a rehearing upon the judgment entered in this matter. The court, having heard the arguments of counsel and studied the briefs is now ready to rule.

IT IS ORDERED that the motion of defendant Ford, Bacon & Davis, Inc. for rehearing be, and the same is hereby, DENIED.

REASONS

The personal service exception is the legal recognition of the unique personal relationship between the parties in certain contract situations. Because of this relationship (personal service), it would be unfair to allow the substitution of a trustee in bankruptcy for one of the parties in this personal relationship. However, since the contract here has been executed the rationale and thus the necessity for the exception is no longer present.

APPENDIX "C"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19896

FORD, BACON & DAVIS, INCORPORATED,
Appellant,

versus

M. A. HALAHAN, Trustee,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(December 27, 1962)

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: This is an appeal from a judgment for $10,456.59 in favor of Holahan, trustee in bankruptcy of Gulf Securities of Louisiana, Inc. That amount

had been paid by the bankrupt, Gulf, to appellant, and the principal issue on appeal is whether the trustee was vested with title to the funds from which that payment was made, prior to the payment, under section 70 of the Bankruptcy Act, 11 U.S.C. Sec. 110.[1]

Gulf's business was the promotion of revenue bond issues of political units; as part of that business, Gulf rendered various fiscal and engineering services to bond-issuing political units. Paris-Henry County Public Utility District of Henry County, Tennessee, contemplated a bond issue to finance the county's gas distribution project. It entered into a contract with Gulf's predecessor to perform various fiscal and engineering services in connection with that contemplated bond issue. On May 23, 1957, the contract was assigned to Gulf, with Utility Districts Agreement (Stip. 2).

On August 16, 1957, a petition was filed to have Gulf adjudicated an involuntary bankrupt. On October 25, 1957, appellant[2] was hired to prepare an engineering feasibility report of the gas distribution project. On April 18, 1958, appellant, having completed the study and report, delivered copies of the report to the underwriters; on May 12, 1958,

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[1]In pertinent part, Sec. 70 provides as follows:

"(a) The trustee of the estate of a bankrupt . . . upon his . . . appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located . . . ; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. . . ." 11 U.S.C. Sec. 110.

[2]At all relevant times, appellant, its officers and agents, were without knowledge of the pendency of the bankrupt action against Gulf.

it delivered copies of the report to the county. On July 10, 1958, Gulf was adjudicated a bankrupt. On July 11, 1958, the underwriters purchased the bond issue and paid the county. The county then paid Gulf $48,825 as its fee; Gulf, in turn, paid appellant its fee of $10,456.59, which amount is the subject of this suit.

Appellant contends that Gulf's rights under its contract with the county did not vest in the trustee; as the payment from Gulf to appellant was made from the proceeds of that contract, the trustee is not entitled to recover the amount so paid. This contention is based upon two subsidiary arguments; first that the contract was a "personal services" contract and, secondly, that it was executory on the date of "bankruptcy", which, appellant argues, is the date that the petition was filed. While admitting that the contract was executory on the date that the petition was filed, the trustee contends that the contract was not one for "personal services", and, alternatively, that the "bankruptcy" date was the date of adjudication, by which date the contract had been performed by Gulf.

The general proposition is that the interest of a bankrupt in a contract for personal services, which is executory on the date of bankruptcy, does not vest in the trustee. 4 Collier on Bankruptcy Sec. 70[3] (14th ed. 1962). We agree with appellant that the date of "bankruptcy" is the date on which the petition is filed, so that the determination of what property vests in the trustee is made as of that date. The bankruptcy title provides that "date of bankruptcy", "time of bankruptcy", "commencement of bankruptcy", or "bank-

ruptcy", with reference to time, shall mean the date when the petition was filed.[3]

Section 70(a) explicitly provides that the trustee shall be "vested by operation of law with the title of the bankrupt *as of the date of the filing of the petition.* . . ." (emphasis added). The statutory language could be no clearer. The line of cleavage is marked as of the date on which the petition was filed, and, to determine what property vests in the trustee, we look at the circumstances as they existed on that date. *Goggin v. Division of Labor Enforcement*, 1949, 336 U. S. 118, 124-126; *Everett v. Judson*, 1913, 228 U. S. 474, 479.[4]

Appellee contends, however, that the date of the filing of the petition is the critical date only in situations of voluntary bankruptcy, but where, as here, the situation is one of involuntary bankruptcy, the critical date is that of the adjudication at which time the contract between Gulf and the county was no longer executory. In support of that distinction, he advances the argument that Sec. 70(a) is modified by Section 70(b).[5] Under the latter section, the trustee is given sixty days from the date of *adjudication* within which to accept or reject executory contracts of the bankrupt. Inasmuch as the date of adjudication is, by operation

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[3]Section 1 (13), 11 U.S.C. Sec. 1 (13).

[4]See generally 6 Am. Jur. Sec. 859 (Rev. ed. 1950); 4 Collier on Bankruptcy Sec. 70.05 (14th ed. 1962); 8 C.J.S. Sec. 200 (1962 ed.).

[5]11 U.S.C. Sec. 110 (b). In pertinent part, section 70 (b) provides as follows:

> "Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, . . . Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. . . ." 11 U.S.C. Sec. 110(b).

of law, the date on which the petition was filed in situations of voluntary bankruptcy,[6] Sec. 70(b), insofar as it makes the date of adjudication the beginning of the time period within which the trustee is to act, is meaningful only in situations of involuntary bankruptcy. But it does not follow that the section was intended to make the date of adjudication the "bankruptcy" date in situations of involuntary bankruptcy. Section 70(b) goes no farther than to provide a method by which the trustee can relieve the estate of obligations believed to be onerous to it. See 4 Collier on Bankruptcy, Sec. 70.42[1] (14th ed. 1962). The section does not purport to determine the date of *vesting;* it pertains only to the course of action to be followed by the trustee, and the applicable time limits for that action, in regard to executory contracts which have vested in him under, and on the date provided in, Sec. 70(a). The district judge therefore erred in holding, as he apparently did,[7] that the critical date in this case was the date of adjudication.

The contract between Gulf and the county was executory on the date that the petition was filed. If, as appellant argues, the contract was one for "personal services", it therefore did not vest in the trustee. The question is, under

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[6]Section 18 (f), 11 U.S.C. Sec. 41 (f).

[7]On appellant's motion for rehearing, the trial judge stated. "The personal service exception is the legal recognition of the unique personal relationship between the parties in certain contract situations. Because of this relationship (personal service), it would be unfair to allow the substitution of a trustee in bankruptcy for one of the parties in this personal relationship. However, since the contract here has been executed, the rationale and thus the necessity for the exception is no longer present."

the facts of the case, a close one,[8] but we are of the opinion, and hold, that the contract between Gulf and the county was one for "personal services".[9] While it is true, as the trustee points out, that most of the contracts falling within the "personal services" exception are employment contracts of individuals,[10] it does not follow that a corporation cannot enter into such a contract. *In re D. H. McBride & Co.*, S.D. N.Y. 1904, 132 Fed. 285, 288. The important inquiry is into the nature of the contract itself, to determine if it calls for the exercise of some personal skill and judgment on the part of the bankrupt, or rests upon the other party's placing trust and confidence in the reputation of the bankrupt for skill and integrity.

In the present case, the contract between Gulf and the county called for Gulf to prepare engineering reports on the project for which the bonds were to be issued. It was also called upon to provide financial services, acting as fiscal agent, and legal advice and services, including preparation for the intervention and presentation to the Federal Power Commission. Upon the quality of its service and advice the success of the bond issue would largely depend.

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[8]It has been observed that, "Whether or not a contract involves personal skill, trust or confidence sometimes involves close distinctions, depending upon the nature of the subject of the contract, the circumstances of the case and the intention of the parties." 4 Collier on Bankruptcy Sec. 70.22[3] ((14th ed. 1962).

[9]The trial judge's opinion on rehearing appears to indicate that he was of the opinion that it was such a contract. *Supra*, note 8. In stating his reasons for his decision in favor of appellee, he stated merely that, "The funds received by Gulf from Utility District do not come within the exception afforded personal contracts and the balance due Gulf from Utility District is a chose in action which passes to the trustee".

[10]*E.g.*, In Re Miller, 6th Cir., 1939, 101 F (2) 323, 324; Florence v. Kresge, 4th Cir., 1938, 93 F (2) 784, 786-87; Villar & Co. v. Conde, 1st Cir. 1929, 30 F (2) 588, 590.

Further, Gulf was to act directly with the underwriters, representing the county. Those services were not merely mechanical, capable of successful completion by someone picked at random, or necessarily by other firms engaged in the same type of business. We conclude that the county, in engaging Gulf to perform those services, necessarily relied upon Gulf's reputation. It placed confidence in Gulf's reputation for skill. That the county did not know who would be employed by Gulf to carry out the particular services is not conclusive against appellant's position as appellee argues. To the extent that Gulf had a reputation for skill and integrity, that reputation would be partially based upon the past performance of its employees, so that one could rely upon Gulf's skill in *selecting* employees.

The trustee, however, seeks to uphold the judgment below on the theory that appellant has a provable claim against Gulf's estate under Sec. 63(b)[11] of the Act, so that it should not be allowed to retain the funds paid to it. In order for a claim to be allowed under that section, it must be based upon a benefit furnished to the estate. Since a "personal services" contract does not vest in the trustee, services performed under it would appear not to be "for the benefit of the estate", but, rather for the personal benefit of the bankrupt, with the result that appellant does not have a provable claim under Sec. 63(b). The result of that interpretation, appellee contends, is that other creditors of Gulf by

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[11] 11 U.S.C. Sec. 103(b). In pertinent part, that section provides as follows:

> "In the interval after the filing of an involuntary petition and before the appointment of a receiver or adjudication, whichever first occurs, a claim arising in favor of a creditor by reason of property transferred or services rendered by the creditor to the bankrupt *for the benefit of the estate*. . . ." (emphasis added)

virtue of that contract have no provable claim against the estate. The rights of such creditors are not here in issue, and we make no holding as to their rights.

The contract between Gulf and the county was one for personal services. It was executory on the day that the petition was filed, which is the date of bankruptcy. The contract, therefore did not vest in the trustee, and part of Gulf's subsequent proceeds from the contract could be transferred to appellant, as appellant has shown was done.

The judgment of the district court must be and hereby is, REVERSED, with directions to enter judgment in favor of the appellant.

APPENDIX "D"

UNITED STATES OF AMERICA
STATE OF TENNESSEE
PARIS-HENRY COUNTY PUBLIC UTILITY
DISTRICT OF HENRY COUNTY, TENNESSEE

AGREEMENT

This indenture made and entered into on this the 10th day of May, 1956, by and between the Paris-Henry County Public Utility District of Henry County, Tennessee, and the Gulf Securities, Inc., a Louisiana corporation qualified to do business in Tennessee, and having an office in Shelby County, Tennessee, as follows:

Whereas, the said District was heretofore organized for the purpose of constructing, operating and maintaining a natural gas distribution system and appurtenances within Henry County, Tennessee, and in furtherance of said objective contemplate the construction of said distribution system, and,

Whereas. the Gulf Securities, Incorporated, aforesaid, hereby submits, and incorporates within this contract the following proposal of performance which they hereby agree to perform to-wit:

1. To study preliminary cost and feasibility reports with data concerning ability to finance, ability to operate and type and saleability of bonds.

2. Preparation of detail plans and specifications.

3. Preparation of construction bids, assistance and recommendation in awarding construction contracts.

4. Preparation of financial data for sale of revenue bonds.

5. Preparation of application and appearance before Federal Power Commission for natural gas service, and employment of necessary legal assistance for such services.

6 Preparation of bonds, printing, and sale of bonds.

7. General supervision and resident inspection of construction.

8. Preparation of monthly construction estimates.

9. Final inspection and approval of project.

10. Gulf Securities will furnish feasibility study by Duff and Phelps, and the Duff and Phelps report shall remain the property of Gulf Securities until completion of this contract.

11. Continuous consultation with the District, County, State and Federal agencies interested in project.

12. To provide this complete service and to provide at their own expense the following services, to-wit:

(a) Fully qualified engineers to perform all engineering phases of the projects and submit legally certified reports of same.

(b) Legal counsel qualified to prepare all legal documents, except counsel now employed by the District.

(c) Perform with their own organization all other necessay essentials for the successful marketing of the bonds as outlined in this proposal, and,

Whereas, the District, agrees in consideration of the aforesaid offer by the Gulf Securities, Incorporated, to make available all existing data concerning these projects and will cooperate fully with Gulf Securities, Inc., in preparing the securities for sale so that they will be readily marketable among the investing institutions throughout the country, who are interested in purchasing such securities.

Reports, plans and specifications shall remain the property of Gulf Securities, Inc., until completion of said project and shall not be used by the District for any purpose whatsoever without the written permission of Gulf Securities, Inc.

The District does hereby recognize that Gulf Securities, Inc., will be put to considerable expense in preparing the preliminary feasibility report, the preliminary engineering designs and plans, and expediting the financial program. In consideration of this expense which Gulf Securities, Inc., assumes, the District does hereby bind itself to execute a sale of the proposed revenue bonds provided that the project is economically and legally feasible, and provided that a purchaser be committed to purchase the revenue bonds at a rate of interest which shall not exceed those limits established by law.

This contract shall be in full force and effect for one (1) year from date of its acceptance and shall be renewed for one (1) year periods until such time as the project is completed or abandoned.

In the event that Gulf Securities, Inc., should certify to the District that said project, or any part thereof, is in its opinion inadvisable or economically or legally unsound, the District shall have no obligations to proceed forthwith on the contract, or unsound portions thereof, and both Gulf Securities, Inc., and the District shall be released from further obligations thereunder.

It is further agreed that the restrictions of essential materials necessary to the completion of the project contemplated by this agreement by any order of the United States government, or by any agency thereof, that the contract shall be automatically extended until such order has been amended or rescinded to make such materials available, and

Whereas, for and in consideration of the mutual benefits herein derived, The District agrees to pay for such services in the following amount and manner, to-wit:

It is agreed that the District will provide for the inclusion in the securities to be issued an amount sufficient to pay out of the proceeds of said securities Four (4%) percent Fiscal Agents fee and Five and one-half (5-1/2%) Engineering Fee of the total par value of the securities issued. These sums to be paid Gulf Securities, Inc., as follows: One Hundred Percent (100%) of Fiscal Agents fee at the time of the sale and deposit of said securities with the trustee. Sixty (60%) percent of the Engineering

fee at the time of the sale and deposit of said securities with the trustee; Twenty (20%) per cent when construction of the project is Fifty (50%) per cent complete; Ten (10%) per cent when construction is Seventy-five (75%) per cent complete and the balance of amount when the project is accepted as complete and final by the District which will be full compensation for any and all services described in this proposal. All funds available from the sale of Bonds will be disbursed by the District through a Trustee selected by mutual agreement between the eventual bond purchasers and the District, and,

Whereas, the District heretofore on the 8th day of May, 1956, adopted a proper resolution, consenting to and concurring in the within agreement, said resolution being herein adopted and made a part of this agreement, as fully as though copied herein, and which resolution together with the execution and acceptance appearing below, shall constitute this contract by and between the Gulf Securities, Inc., and The Paris-Henry County Public Utility District of Henry County, Tennessee.

In witness hereof, the parties hereto have hereunto affixed their signatures on the day and date hereinabove written.

GULF SECURITIES, INC.

(Signed) By: A. L. BUSBY

A. L. Busby

Accepted by Resolution adopted by the Paris-Henry County Public Utility District, a copy of which resolution is attached to this contract.

PARIS-HENRY COUNTY
PUBLIC UTILITY DISTRICT
of HENRY COUNTY,
TENNESSEE

(Signed) By: LEE DYER
President
D. B. OWENS
Vice-President
W. T. VAUGHN
Secretary

APPENDIX "E"

THIS AGREEMENT made and entered into this 10th day of July, 1958, by and between Paris-Henry County Public Utility District of Henry County, Tennessee (hereinafter called "District") and Gulf Securities of Louisiana, Inc., a Louisiana Corporation qualified to do business in the State of Tennessee (hereinafter called "Corporation")

WITNESSETH:

WHEREAS, the District and the Corporation heretofore entered into an agreement, dated as of the 10th day of May, 1956, whereunder the Corporation agreed to do and perform certain functions and provide certain services in connection with the determination of the feasibility of the construction and installation of a natural gas transmission and distribution system by the District and the financing thereof; and

WHEREAS, said original agreement was amended under date of May 10, 1957 so as to provide for an extension of the original agreement to and including May 10, 1958; and

WHEREAS, said original agreement, as extended, has expired by lapse of time without the Corporation fully performing the functions or providing the services assumed by it thereunder; and

WHEREAS, a substantial number of differences have arisen between the District and the Corporation concerning the performance by the Corporation of its obligations under said original agreement as extended; and

WHEREAS, the District and the Corporation are desirous of resolving the number of differences that have arisen between them with respect to the extent of the Corporation's performance under the original agreement, as extended, and the compensation to be paid the Corporation; and

WHEREAS, the District is about to sell and deliver its bonds to finance the cost of construction and acquisition of its proposed natural gas transmission and distribution system within the District, NOW THEREFORE,

In consideration of the performance of the covenants and agreements hereinafter set forth by the parties hereto, the parties hereto do hereby agree as follows:

1. As compensation for the services rendered and provided by the Corporation to the District, the District hereby agrees to pay to the Corporation, out of the proceeds of the bonds to be sold and delivered by the District, a sum of money equal to 3 1/2% of the principal amount of the bonds sold and delivered by the District within 90 days of the date of this Agreement. Payment of said sum by the District to the Corporation shall be made as follows: (1) Ninety per cent (90%) of the sum due shall be paid at the time of delivery of and payment for the bonds by the purchasers thereof and (2) Ten per cent (10%) shall be retained by the District and paid to the Corporation upon completion of all engineering services of the construction engineer required in connection with the constructing of the System by the District.

2. In consideration of the receipt of the foregoing compensation by the Corporation, the Corporation agrees to pay and discharge all obligations heretofore incurred by the Corporation or the District in connection with (a) any engineering services provided to the District or the Corporation with respect to the proposed system of the District, including the fees and charges of International Engineers, Inc., Ford, Bacon and Davis, Incorporated and R. W. Stafford Co.; (b) all fees and expenses for legal services to the District, with the exception of the fees and expenses of Fisher Neal, Esq., including the fees and expenses of Doerner, Rinehart, Stuart & Clammer in connection with the proceedings before the Federal Power Commission and of Caldwell, Marshall, Trimble & Mitchell, as bond attorneys, in connection with the issuance and sale of the proposed bonds of the District, and (c) all printing costs and charges, including the printing of the bond blanks to be used in the issuance and sale of the bonds by the District and the printing of all bond resolutions and trust agreements required in connection with said financing.

3. Upon the execution of this Agreement by the District and the Corporation, the same shall henceforth constitute the sole and only contractual arrangement between the parties hereto and the sole and only obligation of the District for the payment of compensation to the Corporation shall be that referred to in Paragraph 1 above, and all other agreements contracts and arrangements, if any, existing between the parties hereto are hereby superseded, rescinded and revoked.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed by their respective officers duly authorized as of the date hereinabove first set forth.

GULF SECURITIES OF
LOUISIANA, INC.
By /s/ H. C. Haack
President

SEAL
ATTEST

By E. G. Stevens
Secretary

PARIS-HENRY COUNTY
PUBLIC UTILITY DISTRICT
OF HENRY COUNTY,
TENNESSEE
By /s/ D. B. OWENS
President

SEAL
ATTEST

By /s/ W. T. VAUGHN
Secretary

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Supreme Court of the United States

October Term, 1962.

Office Supreme Court, U.S.
FILED
APR 12 1963
JOHN F. DAVIS, CLERK

No. 765

M. A. HOLAHAN, TRUSTEE,
Petitioner,

versus

FORD, BACON & DAVIS, INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARRY McCALL,
and
GIBBONS BURKE,
Attorneys for Respondent,
1500 National Bank of
Commerce Bldg.,
New Orleans 12, La.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1962.

No. 965

M. A. HOLAHAN, TRUSTEE,
Petitioner,

versus

FORD, BACON & DAVIS, INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

QUESTION PRESENTED.

Respondent submits that only one question is presented in this case:

Does a bankrupt's contract which involves skill on the part of, and confidence in, the bankrupt and which is incomplete at the date of the filing of a petition for involuntary bankruptcy vest in the bankrupt's trustee?

II.

REASONS FOR NOT GRANTING WRIT.

1. The Court of Appeals' Decision is Correct.

This is, of course, the most important reason for refusing the writ. The Court held that the contract between the bankrupt and the political subdivision involved skill upon the part of the bankrupt and confidence in its integrity and reputation.

> "To the extent that Gulf had a reputation for skill and integrity, that reputation would be partially based upon the past performance of its employees, so that one could rely upon Gulf's skill in *selecting* employees." (p. 31, Petition for Writ.)

Thus the contract between the bankrupt and the political subdivision was non-assignable and falls into that category of property which is excluded from the property passing to the bankrupt's trustee. For the contract is, under 11 USCA 110a(5), not a "right(s) of action, which prior to the filing of the petition he (the bankrupt) could by any means have transferred * * *".

The Trustee's attempt to maintain that the critical date for the determination of the completion *vel non* of the bankrupt's contract with the political subdivision should be the date of adjudication was succinctly answered by the Court:

> "The general proposition is that the interest of a bankrupt in a contract for personal services

which is executory on the date of bankruptcy, does not vest in the trustee. 4 Collier on Bankruptcy Sec. 70[3] (14th ed. 1962). We agree with appellant that the date of 'bankruptcy' is the date on which the petition is filed, so that the determination of what property vests in the trustee is made as of that date. The bankruptcy title provides that 'date of bankruptcy', 'time of bankruptcy', 'commencement of bankruptcy', or 'bankruptcy', with reference to time, shall mean the date when the petition was filed." (pp. 27-28 of Petition for Writ.)

2. There is No Disagreement Among the Circuits.

The Fifth Circuit has joined the First, Fourth and Sixth Circuits in holding that a non-assignable contract of the bankrupt does not vest in the trustee if that non-assignable contract was not completed at the date of the filing of the petition.

(a) In the First:

In *Villar & Co. v. Conde*, (1 Cir. 1929) 30 F. 2d. 588, the Court said:

> "It is further argued, although the point was not taken in either of the courts below or assigned here, that the defendant, Conde, could not maintain his counterclaim on the ground that the right of action vested in the trustee in bankruptcy. We do not regard ourselves called upon to consider this question, but we cannot refrain from saying that it is frivolous and without merit. The contract, for the breach of which the counterclaim was

brought, had not been broken at the time the petition in bankruptcy was filed. It was then an uncompleted and unbroken contract for personal services involving trust and confidence. Under these circumstances neither the contract nor the right of action passed to the trustee. 3 Remington, §§ 1231, 1269, 1266." (p. 592.)

(b) In the Fourth:

In *Florance v. Kresge,* (4 Cir. 1938) 93 F. 2d 784, the Court said:

"And we agree, also, with the court below in holding that no rights which could be asserted against Kresge under the 5 per cent. rental agency contract passed to the receivers or to the trustee in bankruptcy. That contract, which was in writing, provided for personal services involving a relationship of personal confidence and is to be distinguished from the oral contract under which Connelly was promised 20 per cent. of the profit for reletting the property for Kresge at an advanced rental and which had already been performed on his part. It was the usual form of rental agent's agreement, providing for the collection of rental by the agent and the payment of a commission of 5 per cent. on the rent collected. While the rental of the premises was recited as one of the considerations for the creation of the agency, it is clear that the commissions stipulated were for services to be rendered in the collection of rental * * *."

* * * * *

"A different situation exists, however, with respect to the contract under which Connelly was

promised 20 per cent. of the profit to be derived from subleasing the property. The services which he, as agent, was to render under that contract had already been performed at the time of the bankruptcy; and nothing remained to be done on his part. While he, or the partnership which was the beneficiary of the agreement, could deduct the compensation for this service from the rental as collected, it was not compensation for the collection, the latter being covered by the 5 per cent. contract. We see no reason, therefore, why Connelly, or the partnership, would not have been entitled to the 20 per cent. due as compensation for negotiating the sublease, whoever may have collected the rental from the subtenant. It had become a right under the contract not coupled with any personal obligation or confidence and, as such, was assignable and passed to the trustee in bankruptcy under Bankr. Act §70a(5), 11 U.S.C.A. §110(a)(5)." (pp. 786/7.)

(c) In the Sixth:

In *Miller v. Mutual Holding Co.*, (6 Cir. 1939) 101 F. 2d 323, the Court said:

"On January 6, 1934, Miller, relying upon his contract, brought suit in the Court of Common Pleas of Mahoning County, Ohio, against Hamilton for damages for a breach of the contract and for an accounting. The suit resulted in a judgment in Miller's favor for $5,516.30. He had not listed the claim upon which he sued in his schedules filed in bankruptcy.

"On October 25, 1935, the City Trust & Savings Bank, a creditor (predecessor to appellee, The

Mutual Holding Company), filed a petition to reopen the bankruptcy case for the purpose of administering the judgment against Hamilton as an asset of Miller's estate. Miller resisted upon the ground that the contract upon which the judgment was obtained was for personal services requiring the exercise of skill and judgment upon his part and that Hamilton had entered into it by reason of his confidence in Miller's peculiar ability to supervise and manage the mining operations, and that therefore his, Miller's, interest in it was not transferable to his trustee. The Master reported that the petition should be denied. The Court overruled the Master and granted it.

"Miller's contention has merit. He was an experienced miner. He had, for over fifteen years, built up some knowledge of, and aptitude for, coal stripping operations. It was his acumen that led to the discovery of the particular mine involved. He offered to operate it if Hamilton would finance it. We do not think that Miller's rights, under such a contract, passed to his trustee. They depended upon the personal performance of his obligations. The trustee very probably would have been wholly unfit to operate the mine and Hamilton would not have been required to accept his services." (p. 324.)

3. The Holding of the Circuits is Consonant With the Recognized Authority on Bankruptcy Law.

Collier's 4th Edition, Volume 4, succinctly sets forth the proposition:

"Where an uncompleted contract between the bankrupt and another is of such a nature as to

be based on personal service, or skill, or personal trust and confidence, the bankrupt's trustee does not take title to the bankrupt's rights in such contract. Accordingly, it has been held that the bankrupt may bring an action for a subsequent breach thereof. On the other hand, where the contract has been completed before bankruptcy to the extent that nothing remains to be done but the payment of money, the claim becomes a chose in action that passes to the trustee and is assignable by him." (pp. 1166/8.)

(See also: *Remington Vol. 3, page 590.)*

III.

THERE IS NO ISSUE THAT THE CIRCUIT ASSUMED FACTS.

The Trustee, however, suggests that the Fifth Circuit assumed an unstipulated fact—that the funds paid by the bankrupt to the respondent came from the avails of the bankrupt's non-assignable contract. For instance:

> "The stipulation does not contain any statement that shows that the defendant-appellant was paid the $10,456.59 out of the $48,825.00 received by the bankrupt from the County on the contract in question." (p. 9 of Petition for Writ.)

* * * * *

> "The plaintiff-appellee has already pointed out in the Statement of the Case that all relevant facts

in connection with litigation were stipulated to by the parties. In spite of this, the Court of Appeals in its decision assumed the fact that the defendant was paid out of the $48,825.00 received by the bankrupt from the contract with the County. This fact was not stipulated to by the parties and does not form part of the record." (p. 16 of Petition for Writ.)

The Trustee's suggestion is without basis. The stipulation of fact states that on July 11, 1958, the bankrupt received a check for $48,825 from the political subdivision and contemporaneously issued its check to respondent for $10,456.59.

With even greater particularity the Trustee, in his Petition for Writ, traces the fund:

> "On July 10, 1958, the bond issue was ready to be sold, and the actual sale of the bonds took place on July 11, 1958, at which time the County delivered to Gulf, the bankrupt, its check for $48,825.00. This check was deposited in the regular checking account of the bankrupt corporation maintained in the Union Planters Bank, Memphis, Tennessee." (p. 8 of Petition for Writ.)
>
> * * * * *
>
> "On July 11, 1958, Gulf, the bankrupt, issued a check to the defendant-appellant, Ford, Bacon & Davis, Inc., in the amount of $10,456.59. This check was drawn on the regular checking account maintained by the bankrupt in the Union Planters Bank, Memphis, Tennessee, and the check was paid by the bank on July 15, 1958, some five days after Gulf had been adjudicated a bankrupt." (p. 5 of Petition for Writ.)

Respondent submits that it is quite explicit that the bankrupt received money under the non-assignable contract, deposited that money in Memphis and at the same time drew on that Memphis account to pay respondent. The tracing of the fund is complete and clear.

IV.

CONCLUSION.

This case involves an important portion of Federal law, but a portion which has been well settled by four Circuits in consonance with the recognized authorities, and Respondent therefore submits that the writ should not be granted.

HARRY McCALL,
and
GIBBONS BURKE,
Attorneys for Respondent,
1500 National Bank of
Commerce Bldg.,
New Orleans 12, La.,

By HARRY McCALL.

CERTIFICATE.

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared GIBBONS BURKE, who, after being duly sworn, did depose and say:

That he is one of the attorneys for the respondent in the foregoing brief and that he has caused to be served a copy of the foregoing brief on Paul J. Thriffiley, Jr., Esquire, Attorney for appellee, by placing a copy of same addressed to his office, in the United States Mails, postage prepaid.

/s/ GIBBONS BURKE.

Sworn to and subscribed before me, this 10th day of April, 1963.

(Sgd.) PAUL A. WALTY

Notary Public.

(Seal)